MARGARET C. MORE

IBLA 70-331 Decided March 23, 1972

Appeal from the decision of the Wyoming land office rejecting application W-16405 to acquire certain land under the Color-of-Title Act.

Affirmed.

Accretion--Color or Claim of Title: Generally--Color or Claim of Title: Applications -- Withdrawals and Reservations: Generally: Effect of

Where, by the alteration of a river channel, the private land along the south bank was eroded away and the withdrawn federal land on the north bank was increased by accretion and, subsequently, the river made an avulsive return to its approximate original position, a class 1 application to purchase the accreted land under the Color-of-Title Act is properly rejected because the accreted land came under the influence of the withdrawal as it formed against the withdrawn land, and withdrawn land is not subject to the Color-of-Title Act.

APPEARANCES: Robert K. Weary; Weary, Weary, Medley & Chartier, for the appellant.

OPINION BY MR. STUEBING

This case finds its origins in the alteration of the course of the Republican River in Kansas many years ago. At the point in question the north side of the river served as the southern boundary of Fort Riley Military Reservation. The south bank of the river bounded certain privately owned lands. The river course changed, forming a looping bend, or bow, to the south, thereby diminishing the area of private land lying on the south side and increasing the area to the north, on the Fort Riley side. The river then again altered its course, forming a new channel across the neck, or narrow point, of the bend, and returning very nearly to its original channel, so that a tract of 67.105 acres was left within the oxbow-like configuration thus created.

The Department of the Army and the Bureau of Land Management considered that this tract had formed against and become part of the federal land through the process of erosion and accretion. The Department of the Army declared that the land was in excess of its needs. The land, being deemed withdrawn federal land, was surveyed as such and designated Tract No. 37, Special Section 13, T. 11 S., R. 5 E., 6th P.M., Kansas. Application was then made by the Kansas Fish and Game Commission to purchase the tract pursuant to the Recreation and Public Purposes Act of June 14, 1926, as amended, 43 U.S.C. 869 (1970). The land was classified by the Bureau of Land Management as suitable for such disposition and notice of the impending sale was duly published, whereupon the appellant protested the sale, asserting that she was the owner of the subject land. Her protest was dismissed by the land office, whereupon an appeal was filed with the Director, Bureau of Land Management, in accordance with the then-prevailing administrative procedures.

Prior to the rendition of a decision on the administrative appeal, the appellant initiated an action in the United States District Court for the District of Kansas, same being More v. Udall, et al., Civil Action T-4466, seeking a declaratory judgment and injunctive relief. The parties to the action then stipulated to stay all further proceedings pending plaintiff filing an application under the Color-of-Title Act. It was further stipulated that the filing of such an application would not prejudice the plaintiff's right to proceed with the litigation if the application is rejected. The Court, by its order filed September 24, 1968, approved the stipulation and ordered the proceedings stayed.

Appellant then filed her application to acquire title pursuant to the Color-of-Title Act of December 22, 1928, as amended, 43 U.S.C. 1068, 1068a (1970). The application employed a metes and bounds description for the lands sought rather than utilizing the tract designation assigned by the public land survey. The land office, by letter decision dated December 5, 1968, rejected the application in its entirety on the basis that the lands described in the application embraced an area roughly similar, but not identical to tract 37, so that part of the lands described are not public lands of the United States, and further, that the applicant failed to establish any proper claim or color of title to the remaining land.

It is from that decision that this appeal is brought.

We must first recognize that the land designated as tract no. 37 is regarded by the appellant as public domain for the purposes of this application only, and that the application must be adjudicated as

though there is no dispute of the federal ownership. Otherwise, it would be an application to pay the United States to convey title to property which is not federally owned but, instead, is already owned by the applicant. For that reason we must assume for the purposes of this application that the subject land is accreted land. If accreted land, it is not the land originally patented by the United States. If it is not the original land but rather land accreted to federal land, then it is owned by the United States, whose title can be divested only under authority of an act of Congress. Beaver et al. v. United States, 350 F.2d 4,8 (9th Cir. 1965), cert. denied 383 U.S. 937 (1966).

To the extent that the metes and bounds description in the application describes land outside tract 37 and not owned by the United States, the application was properly rejected for the reason that such land is not public land. Nelson D. Jay, A-27468 (December 4, 1957).

To the extent that the application describes federal land within tract no. 37, the decision below is fallacious. That decision rejects that portion of the offer for the reason that the deed and chain of title relied upon by the appellant describe land in the same physical, or geographic location, but holds that this does not constitute color of title since, due to the erosion and accretion, it is not the same land. The fallacy in this rationale lies in the fact that if the land were the same as that described in the deed, the applicant would have actual title, not merely color of title. Color of title is the appearance, semblance or simulacrum of title which has the appearance, on its face, of supporting a claim of a present title, but which, for some defect, in reality falls short of establishing it. Black's Law Dictionary, 332 (4th edition 1951). We hold that the appellant's claim to land within tract 37 is based upon color of title.

The application is a claim under class 1. 43 CFR 2540.0-5(b). Appellant asserts that her peaceful, good faith, adverse possession under color of title pre-dates her knowledge of federal ownership by considerably more than the requisite 20 years, and that a substantial portion of the land has been reduced to cultivation. There is no refutation of these assertions in the record. The Act of July 28, 1953 (67 Stat. 227), provided for mandatory issuance of land patents to adverse possessors in this class. The issuance of patents to applicants to class 2 is discretionary. Hamel v. Nelson, 226 F. Supp. 96 (N.D. Calif. 1963); U.S. Code Cong. and Adm. News, p. 2014 (1953).

The public land in this area was withdrawn for the military reservation by executive order dated May 5, 1855. By Joint Resolution of Congress, approved March 2, 1867 (14 Stat. 573), the channel of the Republican River in this vicinity was fixed as the southern boundary

of the Fort Riley military reservation and the lands south of the river, formerly within the reservation, were granted to the State of Kansas to aid in the construction of a bridge over the river. Subsequently, the lands eliminated from that reservation were surveyed as shown upon a plat approved May 21, 1868. Those lands were patented to the Republican River Bridge Company on June 13, 1868. Appellant's color of title derives from a chain extending back to the Republican River Bridge Company's patent.

Land, which by accretion attaches to withdrawn federal land, itself becomes withdrawn land. Beaver et al. v. United States, supra; Pallo Verde Valley Color of Title Claims, Solicitor's Opinion M-36684, 72 I.D. 409 (1965).

Our conclusion, then, turns on the issue of whether one may assert a valid claim under class 1 of the Color of Title Act, and thereby be entitled as a matter of law to a patent, where the land applied for is withdrawn from entry or disposition under the public land laws.

Lands which come within the term "reservations" are distinguished from "public lands." "Public lands" are lands subject to private appropriation and disposal under public land law. "Reservations" are not so subject. Statutes providing generally for disposal of the public domain are inapplicable to lands which are not unqualifiedly subject to sale and disposition because they have been appropriated to some other purpose. Federal Power Comm'n. v. State of Oregon, 349 U.S. 435, 443, 444, 448 (1955); see Donald E. Miller, 2 IBLA 309 (May 26, 1971).

This land was not subject to public entry, for it was land accreted to withdrawn land, and withdrawn land is not subject to the Color of Title Act because it is already appropriated for other purposes. Beaver, et al. v. United States, supra, at page 10.

The Color of Title statute recognizes only a claim to a tract of "public land." The term "public land" as used in the statute does not include withdrawn land. The Department has repeatedly held that a [class 1] Color of Title claim cannot be initiated on withdrawn land. Lester J. Hamel, 74 I.D. 125, 128 (1967); Claude M. Williams, Jr. et al., A-29928 (March 26, 1964); see also Packwood Lumber Company, A-28080 (November 16, 1959); Paul L. Van Cleve, Jr. et al., A-28442 (January 12, 1961); Lewis J. H. Bockholt, et al., A-27906 (May 4, 1959); Edward T. Harris, Sr., A-27785 (January 19, 1959); Ralph Findlay, A-23522 (February 23, 1943).

Land attaching to withdrawn federal land by accretion is not public land subject to Color of Title applications even when later separated from the withdrawn land by artificial avulsions. Palo Verde Valley Color of Title Claims, supra.

Some of the foregoing authorities remark upon the fact that the withdrawal of the lands in question predated the initiation of the particular color or claim of title involved. To the extent that this aspect is significant in this case, we will observe that the withdrawal of the land for Ft. Riley predated the patent to the Republican River Bridge Company, and further, that while the subject land was forming against the military reservation on the north side of the river it came immediately under the influence of the withdrawal. Accordingly, the withdrawal had to pre-date the adverse claim which is essential to the color of title application. Color of title probably did not manifest itself until the avulsive action of the river returning nearly to its original channel left the land again on the south bank and restored the appearance of the topography to approximately that which was described by the old survey and the mesne conveyances. In any event we conclude that the withdrawal of the subject land preceded the claim or color of title.

An application to purchase land under the Color of Title Act is properly rejected where the evidence shows that the color of title was not initiated until after the land claimed had been withdrawn. Claude M. Williams, Jr., et al., supra; Axel Ursin, A-28310 (August 4, 1960). This rule applies to claims under class 1. Rowland W. Getchell, et al., A-29147 (February 28, 1963).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed as modified.

Edward W. Stuebing, Member

We concur:

Douglas E. Henriques, Member

Newton Frishberg, Chairman